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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91164764
Party	Plaintiff Brink's Network, Incorporated
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Attachments	Reply Memo in Support of Motion to Extend Opening of Parties' Testimony Periods.pdf ( 5 pages )(218529 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BRINK'S NETWORK, INCORPORATED	)	
	)	
Opposer	)	
	)	
v.	)	Opposition No. 91164764
	)	
BRINKMANN CORPORATION	)	
	)	
Applicant	)	

REPLY MEMORANDUM IN SUPPORT OF MOTION TO  
EXTEND OPENING OF PARTIES' TESTIMONY PERIODS  
PENDING DISPOSITION OF OPPOSER'S MOTION FOR  
LEAVE TO FILE THIRD AMENDED NOTICE OF OPPOSITION

I. INTRODUCTION

Applicant's Memorandum in opposition to the present motion essentially argues that the relief sought by Opposer should not be granted because Opposer's underlying motion for leave to file a third amended notice of opposition ("motion for leave") should be denied. As discussed below, Applicant's argument ignores the prospect that Opposer will be required to proceed with presenting its case-in-chief commencing on September 1, 2010, when its testimony period opens, without knowing what issues will be present unless a decision is rendered on Opposer's pending motion for leave prior to September 1, 2010.

II. ARGUMENT

If the present motion is not granted and the pending motion for leave is still pending as of September 1, 2010, Opposer will be forced to proceed with presenting its evidence during its testimony period without knowledge of what the ultimate issues,

claims and defenses will be. Indeed, it is possible that Applicant will face the same prospect when its testimony period commences on October 29, 2010, if the motion for leave has not yet been decided.

Rather than address that uncertainty, Applicant continues to present its arguments in opposition to Opposer's motion for leave.<sup>1</sup> For example, Applicant argues at p. 3 of its Memorandum that Opposer "has no excuse for its undue delay" in asserting the three registrations asserted in the third amended notice of opposition. However, the very clear reasons as to why Opposer should be entitled to assert the registrations in question -- including certain very recent changed circumstances regarding use of Opposer's marks by its related companies -- are set forth in the memoranda in support of Opposer's motion for leave.

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<sup>1</sup> As part its continuing opposition to Opposer's motion for leave, Applicant filed a Surreply Memorandum in opposition to that motion on July 30, 2010. The introductory paragraph of that Surreply states that "Brinkmann is mindful that surreplies are generally not considered by the Board, but respectfully submits that this surreply is necessary in order to address certain statements made for the first time in Opposer's Reply that should have been submitted in Opposer's Motion." Applicant's statement with respect to the Board's consideration of surreply briefs is simply inaccurate. Rule 2.127(a) of the Trademark Rules of Practice specifies that the moving party may submit an initial and a reply brief and that the opposing party may submit an opposing brief, and further expressly states that the "Board will consider no further papers in support of or in opposition to a motion." To the same effect, TBMP § 502.02(b) specifically provides that once the briefs specified in Rule 2.127(a) have been filed, "[n]o further papers (including surreply briefs) will be considered by the Board, and any such papers filed in violation of this rule may be returned to the filing party." A number of Board decisions have applied these provisions and rejected surreply briefs. *E.g.*, *Gunty-Renker Corp. v. Boyd*, 88 USPQ2d 1701, 1701 (TTAB 2008); *No Fear Inc. v. Rule*, 54 USPQ2d 1551, 1553 (TTAB 2000); *University of Southern California v. University of South Carolina*, 2003 TTAB LEXIS 367 (Trademark Trial & App. Bd. July 31, 2003) (non-precedent); *Folie A Deux Winery v. Renwood Winery, Inc.*, 2000 TTAB LEXIS 836 (Trademark Trial & App. Bd. Dec. 18, 2000) (non-precedent).

The simple, uncontested fact is that both parties face an uncertainty as to the issues that will be presented for trial until a decision is rendered on the pending motion for leave. If the motion for leave is granted, the parties agree that discovery should be extended and the testimony periods reset. However, even if the motion for leave is denied, it is respectfully submitted that the testimony periods should be reset so that the parties can each proceed with presenting their case-in-chief based on a clear understanding of the claims, defenses and counterclaims in this proceeding.

Finally, Applicant argues at p. 4 of its Memorandum that if Opposer's motion for leave is denied, then no extension of the testimony periods is necessary. That point has some validity only if a decision is rendered sufficiently in advance of the opening of Opposer's testimony period so that steps can be taken to present the appropriate testimony and other evidence. However, there is no certainty that such a decision will be rendered in that timeframe which necessitates the filing of the present motion.

### III. CONCLUSION

As previously noted, it is clear that a party has "a right to know the issues before the Board before proceeding to trial." *Midwest Plastic Fabricators, Inc. v. Underwriters Labs. Inc.*, 5 USPQ2d 1067, 1069 (1987). The extension sought by the present motion is predicated on that fundamental proposition which Applicant does not appear to contest.

For all of the reasons stated above and in its initial, supporting Memorandum, Opposer respectfully requests the Board to grant its Motion to Extend Opening of Parties' Testimony Period Pending Disposition of Opposer's Motion for Leave to File Third Amended Notice of Opposition.

BRINK'S NETWORK, INC.

Date: August 6, 2010

By: 

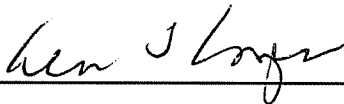
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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Reply Memorandum in Support of Motion to Extend Opening of Parties' Testimony Period Pending Disposition of Opposer's Motion for Leave to File Third Amended Notice of Opposition was served on the following attorneys of record for Applicant by Federal Express overnight courier service on this 6th day of August, 2010:

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